IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 26 OF 2005

Shiri @ Shrikant Gaunkar,
S/o Ramchandra Gaonkar,
House No.417, Shepem,
Ambaulim, Quepem Goa,
Presently in Central Jail,
Aguada, Bardez, Goa. ... Appellant/Accused

versus

State of Goa
Through Public Prosecutor,
Panaji Goa. ... Respondent

Mr. M. P. Amonkar, Advocate for the Appellant/Accused.

Ms. W. Coutinho, Public Prosecutor for the Respondent/Complainant.

CORAM : V. C. DAGA &
N. A. BRITTO, JJ.

DATE : 7TH AUGUST'06.

J U D G M E N T(Per N. A. Britto, J.)

This appeal is by the accused, aged 24 years, who has been convicted and sentenced under Section 302 I.P.C. to suffer life imprisonment and to pay a fine of Rs.10,000/- in default to undergo S.I. for 6 months.

2. Mahadev G. Deikar, aged about 40 years, the deceased, and the accused were both residents of village Ambaulim in Quepem Taluka. It appears that the accused is from ward known as Shepem while the deceased is from a ward known as Kargegal, though the evidence on this aspect appears to be conflicting. The deceased was working as a loader on a tipper truck of one Kantu Dessai and used to go to work at 5 a.m. and return home at 8 p.m. On 21-3-2001, the deceased went for his work as usual but returned early at about 2 p.m., as the truck had to be kept for repairs in the garage. The deceased had lunch, rested for some time and left the house at about 6 p.m. The wife of the deceased, PW15/Madhuri Deikar waited for him till 10 p.m. and on the next day on 22-3-2001 got up at about 5 a.m. and went in search of the deceased. She visited her nephew Devidas who told her that the deceased was seen at about 7 p.m. in the bar of PW10/Prakash Gaonkar at Akamol, Ambaulim. She went in search of the deceased but could not find him. She contacted PW14/Vinanti Deikar, her neighbour and both went again in search of the deceased but not finding him returned for lunch and at about 2.30 p.m. started the search again and this time they took a path leading to a place known as

Vagdongor which according to PW15/Madhuri is at a distance of about half an hour's walk from her house, and, while searching they found the dead body of the deceased in the bushes on the said hillock, Vagdongor. They found that the face of the deceased was full of blood and there were injuries on his face. PW14/Vinanti Deikar rushed back and informed her husband and her uncle PW1/Surya Deikar, the elder brother of the deceased. According to PW14/Vinanti the accused is also her neighbour and they are residents of the same ward. According to PW14/Vinanti, the deceased was not found on the road leading to their house from Arcamol but was found at a distance of about 40 meters approximately. PW1/Surya Deikar lodged a complaint which was registered at about 5 p.m.

3. As a result of the said complaint PW25/I.O. summoned a dog squad and he proceeded to the scene where he recorded the scene of offence panchanama, prepared a sketch and an inquest panchanama. PW18/Manoj took photos of the scene of offence. PW6/Satish Sawant Dessai has narrated in detail as to the articles which were found near about the dead body of the deceased. According to PW6/Satish Sawant there

was a pathway near the body of the deceased. As per PW6/Satish Sawant near about the dead body they saw kurkure/crispies/MO.12, betel nut/MO.16, betel leaf/MO.13, a pen/MO.15, a cap/MO.14, two pairs of slippers, namely one pair of payal make of green colour/MO.17 and another pair of paragon make of blue colour/MOs.18 and 19. The green colour slippers/MO.17 were subsequently identified by PW15/Madhuri Deikar as belonging to the deceased. Upon the arrival of the dog squad headed by dog handler PW21/Krishnanath, the latter noticed only the green colour payal slippers and gave smell of one of the slippers to the Police dog by name Gama and the said Gama is stated to have gone at a distance of about half a kilometer and then stopped in front of a house which was stated to be that of the accused. The green colour slippers/MO.17 were shown to PW21/Krishnanath in Court and he identified the same. According to him, he had not seen any blue colour slippers/MOs.18 and 19. It is, therefore, obvious from the evidence of PW21/Krishnanath that the Police dog Gama barked at a wrong house for it barked in the direction of the house of the accused when it was given the smell of the slippers of the deceased.

4. After the inquest, the body of the deceased was sent for post mortem examination to Hospicio Hospital at Margao where autopsy was conducted by PW4/Dr. Avinash Pujari and he found as many as 10 injuries, or rather injuries grouped under 10 heads. We do not think it is necessary to reproduce all the injuries found by PW4/Dr. Pujari. We would only like to refer to injury nos.1, 5, 6 and 9. Injury No.5 was a contusion which was red, fresh with diffused margins on left side of the skull parieto temporal area above earpinna of 12 x 10 cms. x bone deep, with underlying bones fractured. Injury No.6 was also a contusion with similar characteristics on the chest, front left side supra mammary area, below the collar bone, over an area of 12 x 10 x rib deep. Injury No.9 were multiple contusions of the size of 6 x 4 cms. x muscle deep, 2 to 10cms. x 7 cms. on the lower part of back at T-12 to L-3 spine area on either side(6 in numbers) overlapping with diffused margin, raised, red and fresh. According to PW4/Dr. Pujari, the injuries could have been caused by a rock or a laterite stone, hard and blunt in nature. Regarding injury no.1 which was a contusion of 5 x 4 cms. on the left side of the head, PW4/Dr. Pujari stated that it could be caused by any object which came into contact with surface area

of 5 x 4 cms. PW4/Dr. Pujari stated that injury nos.1 to 8 could not have necessarily been caused by one blow each and he could not say specifically which injuries from 1 to 8 could have been caused by a single blow. At the same time, he stated that injury nos.3, 4 and 5 were caused by separate blows. No weapon or any rock or any laterite stone was shown to PW4/Dr. Pujari and in fact PW4/Dr. Pujari admitted that no weapon was sent to him for giving a weapon report.

5. The prosecution had examined 25 witnesses. There was no eye witness to the incident of murder. The case of the prosecution was solely based on circumstantial evidence. The learned Sessions Judge picked up 11 circumstances and held them as proved against the accused except circumstance(vii) evidence about dog tracking and proceeded to convict and sentence him as stated hereinabove. The learned Additional Sessions Judge held that the evidence of dog tracking was not reliable.

6. The circumstances highlighted to fasten the guilt of the accused could be summarized as follows:-

a). Motive,

b). Last seen,

c). Recovery of weapon, namely a blood stained stone/MO.11 at the instance of the accused.

d).Recovery of the clothes worn by the accused at the time of commission of offence.

e). Recovery of the articles belonging to the accused namely a pen/MO.15 and a cap/MO.14 near the dead body of the deceased.

7. We shall first refer to the evidence of motive. According to the prosecution the accused was on enemical terms with the deceased because the latter was having illicit relationship with the mother of the accused, by name Kamal, and in order to prove the said motive the prosecution examined several witnesses. PW1/Surya Deikar is the elder brother of the deceased and he should have known the best about the relationship of the deceased with the mother of the accused, if any, and if there was one he should have certainly mentioned about it in the FIR lodged by him soon after the dead body was found. It is interesting to note that PW1/Surya Deikar did not even suspect the accused as the person who might have

assaulted his younger brother, the deceased, and on the contrary PW1/Surya Deikar suspected his cousin Balkrishna since he was on enemical terms with them. It appears that although the Police dog Gama, according to the Investigating Officer and PW21/Krishnanath had barked at the house of the accused from a distance, without entering the same, it is the said PW17/Balkrishna Deikar who came to be arrested, first. He was examined by the prosecution as PW17, declared hostile and cross-examined but without any benefit to the prosecution. As stated by him, he was taken to the Police Station on 24-3-2001 at about 1.00 a.m., badly beaten and dropped back at his residence on the same day during evening hours. It is also interesting to note that PW1/Surya Deikar did not suspect the accused even on the second or the third day of the incident but he was summoned by PW25/I.O. only on 24-3-2001 after the I. O arrested the accused. PW25/I.O. has admitted in cross-examination that after the arrest of the accused on 24-3-2001 he called PW1/Surya Deikar and recorded his supplementary statement. PW1/Surya Deikar stated that about 19 years back, his brother, the deceased was friendly with the mother of the accused and in this connection the accused and his brother

Gokuldas had threatened to kill his brother Mahadev. He admitted that in his FIR he had not stated that his brother, the deceased, was friendly with the mother of the accused and admitted that such a fact he had stated only in his supplementary statement. He also admitted that initially he had suspected his cousin PW17/Balkrishna and his family since they were on enemical terms with them. According to him, the accused and his brother had given such threats to his brother in May, 2002. Needless to say that the version given by PW1/Surya Deikar as regards the enemity between the accused and the deceased is nothing but an effort in weaving a story subsequent to the arrest of the accused. If the accused was friendly with the mother of the accused about 19 years back, at that time the accused might have been only 4 to 5 years of age and if that is so one fails to understand as to how the accused could ever have a grudge against the deceased. PW1/Surya Deikar stated that the accused and his brother Gokuldas had threatened his brother the deceased in May, 2002, forgetting that the deceased was already murdered on 22-2-2001. He was not re-examined to explain the said statement. Therefore, the version of PW1/Surya Deikar that the accused was on enemical

terms or for that matter the accused had given threats to the deceased deserves to be rejected as an attempt to create a motive where there was none. Every subsequent witness examined by the prosecution has given their own versions which are again not compatible with the version given by PW1/Surya Deikar. For example, PW9/Kushali Sonu Deikar, to whose evidence we shall refer to a little later in more detail, stated that about 10 years back prior to the incident the deceased was having illicit relationship with the mother of the accused and once the father of the accused had caught Mahadev when he was with the mother of the accused and the father of the accused had assaulted Mahadev because of this illicit relationship. If there was any such incident, PW1/Surya Deikar would have certainly known about the same and would have deposed before the Court. According to PW9/Kushali Deikar the relations between deceased Mahadev and the accused were strained on account of the said incident. PW16/Vithoba Deikar is the uncle of the deceased and he stated that his uncle had illicit relationship with the mother of the accused and because of the said illicit relationship between the accused and the deceased their relations were strained. PW16/Vithoba Deikar gave

another dimension to the story by stating that the accused and the deceased used to fight with each other over the said incident and many a times used to abuse each other near Prakash Bar. PW19/Gokul Raghoba Deikar, the mother of PW16/Vithoba Deikar stated that Kamal Gaonkar, the mother of the accused was in friendly terms with the deceased and on one day about 6 years back the deceased was caught red handed by the husband of Kamal when the accused was in company of Kamal and had assaulted the deceased very badly and that she had told the deceased that he was a bachelor and Kamal was a married woman and he should not go and spoil her home but the deceased did not listen to her and continued to visit Kamal at her house and accused was against Mahadev since he did not like Mahadev coming to the house of Kamal. The discrepancies in the evidence of PW1/Surya Deikar, PW16/Vithoba Deikar and PW19/Gokul Deikar, all closely related to the deceased, were brought to the notice of the learned Additional Sessions Judge and it was argued before him that PW1/Surya Deikar had talked about the illicit relationship between the deceased and the mother of the accused which was 19 years old, PW9/Kushali Deikar having stated that it was 10 years old and PW19/Gokul

Raghoba Deikar having stated it to be of 6 years old, and in the absence of corroboration, their evidence ought not to have been believed and even otherwise such an old incident could not have been the motive behind the commission of murder. The learned Additional Sessions Judge proceeded to discard the said infirmities in the evidence of the said witnesses on the assumption that the accused might have remembered about the said illicit relationship and might have got excited after taking liquor. In our view, the evidence of PW1/Surya Deikar, PW9/Kushali Deikar, PW16/Vithoba Deikar and PW19/Gokul Deikar was not at all corroborative as regards the time of the said illicit relationship and it was nothing but an attempt to fabricate the story after the arrest of the accused. This is also evident from the fact that the statements of the said witnesses came to be recorded subsequent to the arrest of the accused. Moreover, the versions of PW1/Surya Deikar, PW9/Kushali Deikar, PW16/Vithoba Deikar and PW19/Gokul Deikar have been sufficiently nailed as untrue by PW3/Sambhaji Velip who was present in the bar of PW10/Prakash Gaonkar and who is also a labourer from Ambaulim and who stated that the accused and the deceased were talking normally when they were in the bar

and also by PW11/Shrikant Gaonkar who was another customer in the said bar and who stated that there was no quarrel between the deceased and the accused while he was present there. PW10/Prakash Gaonkar has not at all supported the version of PW16/Vithoba Deikar that many a times the accused and the deceased used to abuse each other near Prakash Bar. In fact, if at all such incidents were taking place, PW10/Prakash Gaonkar, PW3/Sambhaji Velip and PW11/Shrikant Gaonkar would have known about the same and would have deposed against the accused. Hence, we are of the view that no motive as alleged has been proved by the prosecution. On behalf of the accused it is contended that absence of proof of motive is sufficient to break the chain of circumstances. In this context, the learned Counsel for the accused Mr. M. P. Amonkar, has placed reliance on two Judgments of this Court. The first is in the case of **Basawraj Tukaram Isran** v. **State of Goa**(2002 ALL MR(Cri) 1348) and the other is in the case of **State of Maharashtra** v. **Bhalchandra Nemgonda Chougule and another** (2003 ALL MAR(Cri) 1896). In the latter case, a Division Bench of this Court observed that ordinarily, failure of the prosecution to establish the motive does not necessarily mean that the entire

prosecution case has to be thrown over board, particularly when the evidence of eye-witness is truthful and trustworthy. However, in a case of circumstantial evidence the motive goes a long way to prove the guilt of the accused. Motive forms one of the main links in the chain of circumstantial evidence and absence of motive or failure on the part of the prosecution to prove alleged motive would be fatal in the case of circumstantial evidence and if it is not proved, the chain of the circumstances cannot be said to have been complete. The Supreme Court in **Mulakh Raj** v. **Satish Kumar and others**(AIR 1992 SC 1175) stated that the failure to discover the motive of an offence does not signify its non existence. The failure to prove motive is not fatal as a matter of law. When facts are clear it is immaterial that no motive has been proved. Absence of proof of motive does not break the link in the chain of circumstances connecting the accused with the crime, nor militates against the prosecution case. Again, the Supreme Court in the case of **Sahadevan alias Sagadevan** v. **State**((2003) 1 SCC 534) has held in the case of circumstantial evidence that if the circumstances relied upon by the prosecution are proved beyond doubt, then the absence of motive would not hamper conviction. There is no doubt that

motive is always relevant and bears a special significance in cases which are based on circumstantial evidence. Motive does not weaken a case but its existence certainly strengthens it and it assumes significance when there is a doubt. It may be of no consequence if the evidence is strong but in a case of this nature where the evidence is very weak motive was of a special significance to the prosecution and the prosecution having alleged it but having failed to prove the same certainly it does break one link in the chain of the circumstances.

8. We take next the last seen circumstance. In fact, what is relevant in criminal trials is a circumstance which is commonly known as last seen together circumstance and this is on the principle that a person who is last found in the company of another, if the latter is found missing, then the person with whom he was last found has to explain the circumstances in which they parted company. In the case at hand, there has been no such circumstance at all. PW10/Prakash Gaonkar is the bar owner who has a bar at Akamol. The evidence of PW10/Prakash Gaonkar, PW3/Sambhaji Velip and PW11/Shrikant Gaonkar shows that there were 4 customers in the bar of PW10/Prakash

Gaonkar on 21-3-2001 around 6.15 p.m. including PW3/Sambhaji Velip, PW11/Shrikant Gaonkar, the accused and the deceased. PW3/Sambhaji Velip and PW11/Shrikant Gaonkar came to the bar first and ordered liquor and sat in the said bar. Later, the deceased came to the bar and ordered liquor and sat along with PW3/Sambhaji Velip and PW11/Shrikant Gaonkar. The accused came next and sat opposite the bench where PW3/Sambhaji Velip was drinking liquor and after some time the accused went out of the bar and again returned after about half a hour and started talking to them. PW11/Shrikant Gaonkar left the bar first followed by the deceased and after about 5 to 15 minutes or so the accused left the bar. In fact, it has been stated by PW3/Sambhaji Velip that the accused left the bar after about 15 minutes of the deceased left the bar. He also stated that the houses of the accused and the deceased were at a walking distance of about 30 minutes and they had to take the same route. It is quite probable that if the deceased had left the bar first by about 15 minutes before the accused, it would have been difficult for the latter to catch up with the deceased anywhere on their way to their respective houses whether they were in the same direction or otherwise. It appears that according to

PW3/Sambhaji Velip the accused as well as the deceased had to take the same route but it appears to us, as explained by the learned Public Prosecutor Ms. W. Coutinho that the houses of the deceased and the accused are in two different directions, in relation to the bar of PW10/Prakash Gaonkar. To complete the trail of the deceased after leaving the bar of PW10/Prakash Gaonkar, prosecution examined PW13/Piedade Carvalho who stated that at about 7.30 p.m. on 21-3-2001 the deceased came to her shop and spent Rs.5/- on betel leaves, betel nuts and Kurkure/crispies and went away. To prove further trail of the deceased and the accused after leaving the shop of PW10/Prakash Gaonkar prosecution has examined PW9/Kushali Deikar. According to PW9/Kushali Deikar at about 5.30 p.m. on 21-3-2000 he went to the canal which is near the house of Ashok Dessai in order to have bath and after having bath he sat there for some time and after some time the deceased came near the canal and was having betel leaves and betel nuts in one hand and kurkure/crispies in the other hand. PW9/Kushali Deikar stated that the accused removed two beedi leaves and gave one beedi to him and the other he put in his mouth and thereafter he went further and told him that he was proceeding to his

residence. PW9/Kushali Deikar stated that the accused came near the canal and was wearing a cap similar to the caps usually worn by muslims. According to him, the accused came near the canal with a cap on his head similar to the caps usually worn by muslims and the accused proceeded in the same direction the deceased had proceeded and after some time he went back to his house and on the next day after he had returned back from work he went to the bar of PW10/Prakash Gaonkar and learnt about the death of the deceased. Firstly, it must be noted that PW9/Kushali Deikar has not seen the deceased and accused together but he saw them after a gap of about 5 minutes. If PW9/Kushali Deikar had seen the accused proceeding in the same direction of the deceased, PW9/Kushali Deikar would have certainly asked the accused as to why he was going in that direction, at that time if the house of accused was in opposite direction as stated by the learned Public Prosecutor. In fact, it was explained by the learned Public Prosecutor that the house of the deceased is in north-east direction at Kargegal while the house of the accused is in north-west direction at a place known as Shepem in relation to the place where dead body was found. PW9/Kushali Deikar stated that he had gone to the canal at

6.00 p.m. and he had met the deceased at that time. He had categorically stated that he did not meet Mahadev after about 7.30 p.m. and again insisted that he had met him at 6.00 p.m. and he was confronted with the statement before the Police where he had stated that he had met the deceased at about 7.40 p.m. and the only explanation which PW9/Kushali Deikar could provide is by way of denial that he had stated that he had not met the deceased at 7.40 p.m. PW9/Kushali Deikar could not have certainly met the deceased at 6.00 p.m. for around that time the deceased might have been either on his way to the bar of PW10/Prakash Gaonkar or in the said bar having drinks. He has admitted that his statement was recorded by the Police on 30-3-2000 and no explanation has been given by the prosecution for the delay in recording of his statement. If PW9/Kushali Deikar had gone to the canal to take bath after about 5.30 p.m. there was no particular reason for PW9/Kushali Deikar to have remained there. The evidence of PW9/Kushali Deikar gives an impression as if he waited there for the arrival of the deceased and the accused. There was no particular reason for PW9/Kushali Deikar to have waited at the canal after taking bath for he has not mentioned any reason in that regard and it

does appear that PW9/Kushali Deikar has been introduced subsequently to show that the deceased went first and followed by the accused. It appears that PW9/Kushali Deikar is otherwise a chance witness whose presence has been introduced subsequently. The contradictions in the timings given by him makes his presence at the canal at the relevant time doubtful. PW9/Kushali Deikar appears to be a planted witness. In any event, PW9/Kushali Deikar does not support the story that he had seen the deceased and the accused together and all that he says is that he saw them after a gap of 5 minutes and the accused and the deceased could have gone therafter in any direction. Suffice it to observe that PW9/Kushali Deikar did not see them together and therefore the circumstance of last seen together was not at all proved by the prosecution. In a similar situation, the Apex Court in the case of **Chandu** v. **State of M.P.** (1992 SC 2302) held that there was no evidence to hold that the accused and the deceased were last seen together. It was a case where the witnesses had stated that they had seen the deceased who was about to cross the canal and the accused who at the relevant time was grazing cattle near the canal and there was no evidence that both of them either talked to each other or even

had met each other near the canal. To complete further trail, allegedly post crime, the prosecution examined PW8/Arjun Deikar who has a shop at Cucwada where he also sells liquor. According to him the shop is sometimes run by his sister and on 21-3-2001 he had gone to the shop between 7.30 to 8.00 p.m. when he saw that there were some labourers, and one customer came to his shop and asked for urak(mild cashew liquor). According to him, the clothes of the said customer were dirty and he appeared to be nervous and he took limca and urak and went away after having the same. He identified the accused as the said person. When he was shown the shirt/MO.8, PW8/Arjun Deikar stated that it was similar to the shirt worn by th accused. When the pant/MO.9 was shown to him he stated that he could not recollect whether the pant worn by the accused was similar to it. In cross-examination he stated that on an average about 10 to 15 people who are not from his village come to his shop. His opinion that the accused appeared to be nervous is based on the fact that he had said hello to the accused and the accused had not reacted or responded and for that reason he found that the accused was nervous. Firstly, we do not see any reason why PW8/Arjun Deikar had to say hello

only to the accused when there were other customers and the latter not having replied to him as to why PW8/Arjun Deikar had to jump to the conclusion that the accused was nervous. His evidence appears to be far from natural. However, it is to be noted that PW8/Arjun Deikar was examined in Court after about 2 1/2 years of the incident narrated by him. PW8/Arjun Deikar has stated that about 10 to 15 persons come to his shop and if accused was one of such customer one fails to understand as to how PW8/Arjun Deikar could have identified the accused as one of the customers after a gap of about 2 1/2 years without any prior identification parade having been held by the prosecution. Admittedly, PW8/Arjun Deikar did not know the accused by name and if any credibility was to be given to PW8/Arjun Deikar then the prosecution ought to have held a identification parade to get the accused identified as one of the customers who had come to his shop on 21-3-2001. In our view, the evidence of PW8/Arjun Deikar is of no assistance to the case of the prosecution. The prosecution also examined PW17/Balkrishna Deikar but he did not support the case of the prosecution for which he was examined. The prosecution declared him hostile and cross-examined him but without any benefit to its case. In

our view, none of the witnesses had seen the accused and the deceased together and if at all they were earlier in the bar of PW10/Prakash Gaonkar, they were there along with the other customers and had left the said bar at different times. In our view, the prosecution has failed to prove that prior to the death of the deceased, the deceased and the accused were seen together at any time.

9. That takes us to circumstance(c) the recovery of stone which the prosecution wants the Court to believe is the weapon with which the deceased was assaulted. We have already noted that the accused was arrested on 24-3-2001 and this recovery took place on 31-3-2001. As per PW25/I.O. while he was interrogating the accused, the accused disclosed to him that he was ready to show the stone which was used while committing the murder of the deceased and then he arranged two panchas, one of whom has been examined as PW23. PW23/Vinod Shirvoikar stated that he came to the Police Station at 4.30 p.m. on 31-3-2001, being called by PW25/I.O. where the accused was brought before them by two constables and upon questioning the accused stated that he would show the place where he had

thrown the stone but did not disclose the said place. According to him, after recording that part of the panchanama, they signed the same and thereafter they proceeded by a Maruti Gipsy and as per the directions given by the accused and upon reaching Akamol the accused told to take left turn, after crossing the canal over the bridge, and then told to stop the jeep. PW23/Vinod Shirvoikar stated that the accused took them to a hill which is known as Vagdongor and the accused as well as they searched for the same and then the accused showed the said stone lying in the bushes which was of white colour and there was blood on the said stone of which measurements were taken and the said stone was wrapped to a cloth which was brought by the P.S.I. According to PW23/Vinod Shirvoikar there was no identification mark on the said stone and such stones were available all over Goa. PW23/Vinod Shirvoikar frankly admitted that all the parties to the panchanama were searching for the stone. According to him, the said stone was lying in the bushes. He identified the said stone/MO.11. Although PW23/Vinod Shirvoikar did not give the measurements of the said stone, we see from the panchanama Exh.62 that the said stone was of length of 7.5 cms. and breadth of 15 cms.

According to PW25/I.O. he had been to the scene of offence many times prior to the recovery of the stone/MO.11 and on the date of the scene of offence panchanama he had minutely checked the scene of offence and the surrounding area but he had not found the said stone. According to him, the bushes where the accused pointed out the said stone were about 10 meters away from the dead body but on the date of the scene of offence panchanama he had not checked the said bushes. This stone/MO.11 was sent to the CFSL at Hyderabad and the report shows that there was blood detected on it but the blood could not be detected as human and much less its blood group. We are inclined to believe that the stone/MO.11 had nothing to do with the injuries caused to the deceased. Firstly, when death is due to injuries or wounds alleged to have been caused by some weapon, it is always the duty of the prosecution to prove by expert evidence that it was likely or at least possible for the injuries to have been caused with the weapon with which and in the manner in which they are alleged to have been caused. It is elementary that where the prosecution has a definite or positive case, it must prove the whole of the case. We have already noticed that the stone/MO.11 was not shown to PW4/Dr. Pujari.

We have noted the size of the stone from the panchanama Exh.62 that its size was 7.5 x 15 cms. We have also noted that the size of injury nos.5 and 6 were 12 x 10 cms. each and stone of that size certainly could not have caused injuries of 12 x 10 x bone deep and the said injuris certainly required a weapon of a larger dimension. As already noticed PW4/Dr. Pujari stated that injury nos.5 and 6 were caused by separate blows and therefore could not have been caused by a blow or hit of the stone/MO.11. The Apex Court in the case of **Kartarey and others** v. **State of U.P.** (AIR 1976 SC 76) observed that it is the duty of the prosecution, and no less of the Court, to see that the alleged weapon of the offence, if available, is shown to the medical witness and his opinion invited as to whether all or any of the injuries on the victim could be caused with that weapon. Failure to do so may sometimes, cause aberration in the course of justice. This was not done. Secondly, this recovery was made on the seventh day of the arrest of the accused. Delay in recovery certainly diminishes the value to be attached to it and that too in the absence of any explanation from the Investigating Officer. A Division Bench of this Court in the case of **Ahmad alias Ahmad Chakri and others** v. **The State of Maharashtra**(1994

CRI.L.J. 274) held that the delay was 4 or 5 days considerably weakened the weight to be attached to the recovery. Thirdly, the stone/MO.11 was found with only blood, not even human blood. Such blood on a stone found in the open after lapse of about 10 days would carry no significance. It is interesting to note that MO.2/Exh.2 was a sample of mud mixed with blood taken from the scene and even on that human blood was not detected. Again, the injury no.9 on the lumbar part of the deceased would have certainly left some blood stains on the underwear of the deceased but on the said underwear MO.7(Exh.7) blood could not be detected. In a situation like this, the detection of blood simpliciter, not even human, on the stone/MO.11 could not be free from doubt. Lastly, the said stone/MO.11 could not have been said to have been recovered at the instance of the accused. Section 27 is in the nature of an exception to the preceding sections 25 and 26 of the Evidence Act. The first important aspect as regards recovery is that the receipt of the information must come from an accused who is in custody, the second is that the discovery of such fact must be deposed to and the third is that the information should relate distinctly to the fact thereby discovered. Distinctly means directly, strictly, unmistably. The

Supreme Court in the case of **Sanjay** v. **State**(2001(3) SCC 190) observed that only that portion of the information which distinctly relates to the fact really thereby discovered is admissible under Section 27 and this is based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true and accordingly it can be safely allowed to be given in evidence. In the case at hand, although the accused stated that he would show the stone he did not even mention the place from which he would show the same. In other words, the place where the stone was lying was not to the knowledge of the accused and if at all the stone was found it was due to the general search conducted by the party accompanying the accused and the Investigating Officer. The accused did not know the place where it was. Therefore, it could not be said that the accused had exclusive knowledge or that he had concealed the stone and the information given by him had led to the discovery. Therefore, it could not be said that the stone/MO.11 was recovered on the basis of information given by the accused. Reliance placed on **State of Maharashtra** v. **B. F. Dhiwa**r(2002 CRI.L.J. 218) is of no assistance to the case of the prosecution. In that case, the

Apex Court observed that the discovery of fact referred to in Section 27 of the Evidence Act is not the object recovered but the fact embraces the place from where the object is recovered and the knowledge of the accused as to it. The Supreme Court observed that it is a fallacious notion that when recovery of any incriminating article was made from a place which is open or accessible to others, it would vitiate the evidence under Section 27 of the Evidence Act. Any object can be concealed in places which are open or accessible to others. For example, if the article is buried in the main roadside or whether it is concealed beneath dry leaves lying on public places or kept hidden in a public office, the article would remain out of the visibility of others in normal circumstances. Until such article is disinterred, its hidden state would remain unhampered. The person who hid it alone knows where it is until he discloses the fact to any other person. In that case, the grinding stone was found in tall grass. The pant and underwear were buried. They were out of visibility of others in normal circumstances. Until they were disinterred, at the instance of the accused, their hidden state had remained unhampered. The Supreme Court, therefore, concluded that the accused alone knew where they were until he disclosed it. In our

view, these observations of the Supreme Court are clearly inapplicable to the case at hand. The accused had not even mentioned the place where he had thrown the stone/MO.11 and the stone/MO.11 was located after a general search of the place was taken. We are, therefore, not inclined to accept that the said stone was recovered on the basis of any information which led directly to its recovery. That is one aspect of the matter. Consequently, we are of the view that this circumstance was not at all proved by the prosecution.

10. That takes us to circumstance (d), the recovery of the clothes at the instance of accused from the veranda of the house of PW20/Namidas S. Velip. The accused was arrested on 24-3-2001 and according to PW25/I.O. from near the house of PW20/Namidas S. Velip. Not from his house. He was brought to the Police Station and an arrest panchanama was conducted in the presence of PW7/Pradip Khurdkar. In fact PW7/Pradip does not support the story that the arrest panchanama was done upon the accused being brought by PW25/I.O. from near the house of PW20/Namidas S. Velip at Colomba, Rivona which we are told is at a distance of about 10 kms. from the house of the accused.

According to PW7/Pradip the accused was brought from inside the cabin and the accused gave his name as Shrikant Gaonkar who stated that he was a resident of Ambaulim, Quepem and at that time the accused was wearing a full sleeved shirt and coffee colour trousers. One fails to understand as to why PW25/I.O. did not seize the clothes worn by the accused since normally whenever an accused involved in a crime of murder is arrested his clothes are seized with a view to find out circumstances to connect him to the crime alleged. Was the I.O. sure that the clothes the accused was wearing were not the clothes the accused wore at the time of the murder of the deceased? The recovery of the clothes of the accused allegedly worn by him at the time of commission of the offence was done in this case on the sixth day after the arrest of the accused and here again without any explanation as regards the delay. PW25/I.O. stated that on 30-3-2001 while he was interrogating the accused, the accused informed that he was ready to show the clothes which he was wearing on the day of commission of the murder and he arranged panch witnesses and in their presence the accused disclosed that he was ready to show the clothes and thereafter along with the panchas he proceeded to Colomba as

per the direction given by the accused. PW2/Vithal Gaonkar who is examined to prove the said recovery stated that on 30-3-2001 he was called to act as a panch along with one Kakodkar and that the accused had stated before them that the clothes worn by him on the day of the incident were kept in the veranda of the house of PW20/Namidas Velip. Thereafter, they along with the accused proceeded to the said house by Police jeep as per the directions given by the accused via Tilamol, Zambaulim and Rivona and then the accused took them to the house of PW20/Namidas Velip and pointed out to the clothes which were hanging on the rope in the veranda and the accused removed the shirt(Exh.8), trousers of black colour with belt (Exh.9) in which there was a wallet, a sleeveless banian of red colour(Exh.10) and a brownish colour underwear which was dirty and which were packed separately. He identified the said clothes and he also stated in his cross-examination that the Police had not told him the place from which the said clothes had to be recovered. The said clothes were subsequently sent to CFSL at Hyderabad and the report shows that only the shirt (Exh.8) had human blood on it. On behalf of the accused it is submitted that the accused is a labourer and it could be that the

blood stains were of the accused himself as he belongs to labour class. On behalf of the accused reliance has been placed on the case of **Kansa Behera** v. **State of Orissa** (AIR 1987 SC 1507) wherein the Supreme Court has stated that evidence of blood group would be the only conclusive evidence to connect the blood stains with the accused. Reliance has also been placed on the case of **State of Rajasthan** v. **Rajaram** (AIR 2003 SC 3601) and it is submitted that in the absence of the blood group being determined on the shirt/MO.8, recovery of the clothes is of no significance.

11. However, on behalf of the accused no effort has been made to show as to why the evidence of the PW25/I.O. or for that matter PW2/Vithal Gaonkar cannot be accepted. The shirt of the accused was found with human blood and it was for the accused to have explained the same. The Supreme Court in the case of **Kuji** v. **State of M.P.**(1991(3) SCC 627) speaking through 3 learned Judges distinguished the case of Kansa Behera (supra) and held that finding of human blood on weapon and clothes of accused can be a material circumstance in the absence of determination of blood group and merely because the

Serologist could not determine the blood group in his report the circumstance of find of human blood stains cannot be said to be of no consequence. The same view is followed in Gura Singh v. State of Rajasthan(2001(2) SCC 205) by stating that mere doubt sought to be created on the non mention of dimension of blood stains by itself was not sufficient, as the accused is entitled only to reasonable doubt. Because the blood group was not ascertained, the recovery made at the instance of the accused cannot be discarded is also the view taken by the Supreme Court in **Motiram G. Pawar** v. **State of Maharashtra**(2002(4) Crimes 64), relying on 2 other decisions referred to therein. PW20/Namidas Velip did not at all support the case of the prosecution that the accused had come to his house. Nothing prevented the prosecution from examining the brother of PW20/Namidas Velip, namely Vishwas or for that matter his two sisters Kantu and Nalini but the prosecution chose not to examine the said witnesses. In our view, the fact that PW25/I.O. did not attach the clothes the accused was wearing, the delay in recovering the said clothes, and the fact that PW20/Namidas did not support the case makes the evidence

of recovery doubtful. Hence, we hold that this recovery of the clothes of accused as not proved beyond reasonable doubt.

12. That takes us to the recovery of the pen/MO.15 and the cap/MO.14 from the scene of offence which according to the prosecution belonged to the accused. The pen/MO.15 which was found at the scene, as per PW6/Satish Sawant, the panch witness was of green colour, a portion of which was transparent and there was a name "merchant mercy" written on it in white colour. PW3/Sambhaji Velip who was one of the customer in the said bar of PW10/Prakash Gaonkar claimed that the accused had put a green colour pen in his shirt pocket. If the pen was in the shirt pocket of the accused, we fail to understand as to how PW3/Sambhaji Velip firstly could have seen it and later after a gap of almost 2 1/2 years identify it in the Court, such a pen being a common article available in the market. The next witness, PW5/Suresh Das Gupta stated that he knew the accused as he and the accused were working at Vinay Enterprise at the Industrial Estate at Cuncolim. According to him, about 3 months prior to the incident he had purchased a green colour ball pen from one shop at Cuncolim and the words "merchant mercy"

were written on the said pen in white colour. He further stated that he had purchased the same pen for his use and the accused has taken the said pen on 17-3-2001 as he wanted to write something and the accused did not return the said pen on that day. PW5/Suresh stated that on 19-3-2001 the accused returned the said pen to him and took it back on the same evening as he wanted to write something and the accused did not report to work after 19-3-2001, and, he went to work on 27-3-2001 as prior to that for about 2 to 3 days he had gone out and had not gone for work and on 27-3-2001 when he went to work he came to know that the Police were on his look out and he went to the Police Station on 3-4-2001 and they inquired with him about the said pen and he told them that he had given the said pen to the accused. This part of the story of PW5/Suresh has not been corroborated by PW25/I.O. In cross-examination he stated that there may be similar pens in the Cuncolim market. He also admitted that the Police had not shown to him any pen at the Police Station nor was the pen shown to him when his statement was recorded by the Police. In fact, PW25/I.O. has not at all explained as to how he came to know that the accused had borrowed any pen from PW5/Suresh, and that takes us to the

story of the cap/MO.14. PW10/Prakash Gaonkar stated that when the accused came to his bar the accused had worn a cap which is normally used by muslims and he subsequently identified the said cap shown to him before the Court on 2-1-2004. PW10/Prakash Gaonkar did not give any colour of the said cap. PW3/Sambhaji Velip who was another customer in the bar stated that the accused had worn a cap of golden colour shining design of the type usually worn by muslims. PW11/Shrikant Gaonkar who was another customer in the bar stated that the accused had worn golden colour cap of the type which is usually worn by muslims. He also identified the said cap before the Court. PW9/Kushali Deikar whose evidence we have rejected as being unreliable and being that of a planted witness, stated that the cap worn by the accused was a cap which had golden threads usually worn by the muslims. According to PW6/Satish Dessai the said cap was silver/golden colour shining cap. The said cap was shown to us from a photograph at Exh.53 colly. and it does not meet the description given by any of the witnesses. It has been submitted on behalf of the accused that different witnesses have given different description of the said cap but the basic colour has not been

mentioned by them. The said cap as can be seen from the photograph Exh.53 colly. is predominantly red, yellow/gold and green in colour. It is not the case of the prosecution that the accused was usually found wearing the said cap and the prosecution has also not suggested any particular reason as to why on that particular day the accused had to wear the said cap, which is otherwise usually worn by muslims.

16. The learned Additional Sessions Judge has concluded that the accused might have worn the said cap to hide his face but we are not impressed by such a conclusion. The cap/MO.14 cannot be used to hide the face. If according to PW3/Sambhaji Velip, PW10/Prakash Gaonkar and PW11/Shrikant Gaonkar the said cap is of the type usually worn by muslims, then certainly there was nothing peculiar to identify the same, such cap being easily available in in the market and whether it is the pen/MO.15 or for that matter the cap/MO.14, being ordinary items available in the market, they ought to have been got identified by the said witnesses, before they identified the same before the Court. It is contended on behalf of the accused that in the

absence of test identification parade being held as regards the cap/MO.14 and the pen/MO.15, the identification of the said articles without a prior test identification parade could not have been accepted. The established position of law is that the evidence of a test identification parade cannot form the basis of a conviction as it is not a substantive evidence. However, the purpose of a test identification parade is to test the statement of the witness made in Court which constitutes substantive evidence. The question, therefore, is whether the identification of the cap/MO.14 and the pen/MO.15 could have been accepted for the first time after a period of more than 2 1/2 years. Facts which establish the identity of any person or thing whose identity is relevant are by virtue of Section 9 of the Evidence Act, always relevant. The term identification means proving that a person, subject or article before the Court is the very same that he or it is alleged, charged or reputed to be. Identification is almost always a matter of opinion or belief. If before the Court a witness pointed out to a stranger and stated that he was an offender, or pointed out to an article and affirmed that it was his property which had been stolen or an article which is claimed the accused was wearing, there would be no guarantee

of the truth of his assertion. In order to have some assurance of the truth a test identification is held i.e. the witness at an early stage is confronted with the alleged offender or article not standing alone but mixed with a number of innocent persons of the same age group and of similar built or the suspected stolen article or the article the criminal was seen with, are mixed with a number of other articles which resemble it. The substantive evidence on which the Court alone can base its conviction or acquittal is that given by the witness before the Court but the value of his evidence having identified the accused or the article is of little consequence unless that evidence is corroborated with the evidence of prior identification after the witnesses reliability has been put to test. The purpose of identification test is to test the memory and veracity of a witness, who claims to identify an accused person or the thing. It may be quite easy for a witness to identify an accused in the dock or a thing if shown to him in Court and show that he was the person who had committed the crime or the thing used by an accused. Therefore, for the purpose of testing the memory and veracity identification parades are held. We have already noted that PW5/Suresh has not even given the basic marks of

identification of the said pen, as identified by PW6/Satish. We have also noted that there is no evidence from the Investigating Officer as to how he came to know that the said pen belonged to PW5/Suresh. As per PW3/Sambhaji Velip, PW10/Prakash Gaonkar and PW11/Shrikant Gaonkar the cap was of the type ordinarily worn by the muslims and if that is so the cap as well as the pen appear to be of ordinary type and things of common use. The description given by PW3/Sambhaji Velip, PW10/Prakash Gaonkar and PW11/Shrikant Gaonkar of the cap hardly fits the cap. Being ordinary articles, it was necessary for the prosecution to have got the said articles identified by the said witnesses and only such prior identification which is by way of corroboration that the identification of the said articles for the first time in Court after a gap of more than 2½ years could have been accepted. The said articles being of ordinary and common use, as stated by the aforesaid witnesses themselves it is doubtful whether they would have been able to single out or distinguish them in case they were mixed up with other similar articles. As far as PW3/Sambhaji Velip, PW10/Prakash Gaonkar and PW11/Shrikant Gaonkar are concerned they had seen the accused, only once with the said cap and the next time they saw

the cap before the Court after a gap of more than 2 1/2 years. As stated by the Supreme Court in **Malkhasingh** v. **State of M.P.** ((2003) 5 SCC 746) it is trite to say that the substantive evidence is the evidence of identification in court. Apart from the clear provisions of Section 9 of the Evidence Act, the position in law is well settled by a catena of decisions of this Court. The facts, which establish the identity of the accused persons, are relevant under Section 9 of the Evidence Act. As a general rule, the substantive evidence of a witness is the statement made in court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of a prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in Court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings. This rule of prudence, however, is subject to exceptions, when, for example, the Court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration. This principle is equally

applicable to articles, things or objects. The mere fact that the said cap was shown to the said witnesses in Court was certainly likely to influence the minds of the witnesses and make them think that the cap shown was the cap they had seen the accused wearing. In our view, considering the facts of the case it was necessary for the prosecution to get the said articles identified by holding a test identification parade, firstly to ensure that the investigations were proceeding on right lines and secondly to provide corroboration to the evidence to be given later in Court considering that the said articles were of ordinary and common use. In the absence of such evidence of prior identification the identification of the said two articles for the first time after a gap of 2 1/2 years cannot be accepted as trustworthy and free from doubt. Therefore we are not inclined to accept that the said cap/MO.14 or for that matter the said pen/MO.15 belonged to the accused, the pen having been borrowed from PW5/Suresh. We are unable to understand as to on what basis PW5/Suresh could say that the said pen/MO.15 belonged to him. In our view, the identification of the said articles for the first time before the Court after a gap of more than 2 1/2 years cannot be accepted free from doubt in the absence of prior test

identification. This circumstance has also not been proved beyond reasonable doubt.

17. Lastly, certain observations are required to be made as regards the scene of offence. Needless to say a good sketch certainly helps the Court to appreciate the evidence led, if not anything more. The prosecution did get a sketch prepared by PW12/Augusto Pereira, a Junior Engineer working in P.W.D. but the said sketch is wanting in necessary details. Firstly, it does not show either the house of the accused or for that matter the house of the deceased. Upon instructions, it was stated by the learned Public Prosecutor that considering the place where the dead body of the deceased was found, the house of the deceased is in north-east direction while the house of the accused was in north-west direction. When it was pointed out to the learned Public Prosecutor as to why the pathway leading to the place where the dead body was found was not shown proceeding further in north-east direction to the house of the deceased, all that the learned Public Prosecutor has stated is that it is a mistake of I.O. but such a mistake made by the Investigating Officer should not be used to disbelieve the entire case of the

prosecution. The said sketch-Exh.39 ought to have shown the bar of PW10/Prakash Gaonkar and the stall of PW13/Piedade Carvalho. It does show the irrigation canal where according to the prosecution PW9/Kushali Deikar had gone to take a bath. The sketch also does not show the bar of PW8/Arjun. If the deceased had taken a short cut over the said hillock to reach his house, there is no explanation from the prosecution as to why the said deceased had to take the said short cut, via a route where there were no lights when otherwise a pucca road is available to go to the house of the deceased from the bar of PW10/Prakash Gaonkar. In fact, PW16/Vithoba Deikar, the nephew of the deceased, has stated that they do not use the pathway leading through Vagdongor to go to their houses. If, as per PW14/Vinanti Deikar the accused and the deceased are from the same ward and are her neighbours, it appears that the Investigating Officer is not right when he located the houses of the accused and the deceased before this Court with the sketch Exh.36 in different directions. If according to PW14/Vinanti Deikar there is a road leading from her house to Arcamol and the same road also leads to the house of the accused, according to PW15/Madhuri Deikar the road leading to her house does not

lead to the house of the accused and the accused has to take a separate road. PW25/I.O. has in fact stated that he could not state the distance between Shepem(house of the accused) and Kargegal(house of the deceased) even by approximation. He also stated that he could not give the distance between the residence of the accused and the scene of offence. It follows from that, that the Investigating Officer himself was not conversant with the scene of offence in relation to the houses of the accused, the deceased and of the witnesses he examined. He ought to have found out for himself whether what the witnesses were stating was probable or not, in relation to the situation of their houses, distances, etc.

18. The tests required to be met before an accused is held guilty in a case based on circumstantial evidence have been set out by the Supreme Court in the case of **Sharad Birdhichand Sharada** v. **State of Maharashtra**(1984 4 SCC 116) and we do not propose to reproduce them herein. In a case based on circumstantial evidence, all the circumstances sought to be proved must first be proved beyond reasonable doubt and after the same are proved they must be inevitably and exclusively

point out to the guilt of the accused and there should not be any circumstance which may reasonably be considered consistent with the innocence of the accused and the Court is required to see the cumulative effect of the circumstances proved in a given case. The circumstances proved must also be such as that they cannot be explained on any other hypothesis except the guilt of the accused and they should be of an incriminating character. We have already concluded that the circumstances referred to herein above and sought to be proved were not free from doubt to connect the accused in a serious offence of murder. We are, therefore, inclined to give benefit of doubt to the accused.

19. As a result, we allow the appeal, set aside the Judgment/Order of the learned Additional Sessions Judge and acquit the accused under Section 302 I.P.C. Accused be set to liberty in case he is not required in any other case.

V. C. DAGA, J.

N. A. BRITTO, J.

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